

1 UNITED STATES DISTRICT COURT
2 MIDDLE DISTRICT OF TENNESSEE
3 NASHVILLE DIVISION

4 CONCORD MUSIC GROUP, INC.)
5 VS) No. 3:23-cv-0606
6 X CORP)

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10 BEFORE THE HONORABLE BARBARA D. HOLMES,
11 MAGISTRATE JUDGE

12 **TRANSCRIPT OF ELECTRONIC RECORDING**

13 January 6, 2025
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2 The above-styled cause came to be heard on
3 January 6, 2025 , before the Hon. BARBARA D. HOLMES,
4 Magistrate Judge, when the following proceedings were had
5 to-wit:

6 **TRANSCRIPT OF ELECTRONIC RECORDING**

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9 THE COURT: Go ahead and have a seat,
10 everyone. We are here in the matter of Concord Music
11 Group, Inc. versus X Corp, No. 3:23-cv-00606. Let me go
12 ahead and get appearances, please.

13 MR. RILEY: Good afternoon, Your Honor.
14 Steve Riley representing the plaintiffs. I'm here with
15 my partner, Grace Peck, and Scott Zebrak and Meredith
16 Stewart. Scott and Meredith are from Washington, DC.

17 THE COURT: Very good. Thank you,
18 Mr. Riley.

19 MR. HARBISON: Morning, Your Honor. Jay
20 Harbison from Neal & Harwell for the defendant. With me
21 this afternoon are Mr. Dylan Scher and Andrew Shapiro
22 from Quinn Emanuel. Mr. Scher is from New York, and
23 Mr. Shapiro is from Chicago.

24 THE COURT: Very good. Welcome, everyone.

25 All right. The purpose of this afternoon's

1 proceeding is for a hearing on the discovery dispute that
2 was referred from Judge Trauger. I have read the
3 parties' papers, reviewed the discovery requests that
4 were made in dispute. And thank you for your update,
5 updated filing regarding resolution of some of the
6 matters that were previously in dispute. And I am ready
7 to hear any additional argument that you'd like to make.

8 I don't need to have a great amount of
9 detailed argument. I understand the issues and it
10 doesn't seem to me that they are that complicated to
11 resolve, but I'm always happy to hear if there's
12 something else that you would like to add to the filings
13 that have already been made in the case.

14 So I suppose since this is really the
15 plaintiff's request, somewhat in the nature of a motion
16 to compel to -- at least compel the more complete
17 responses to the discovery. Let me go ahead and hear
18 first from whomever's going to argue on behalf of the
19 plaintiff, then. You can come on up to the podium.

20 MR. ZEBRAK: Thank you, Your Honor. My name
21 is Scott Zebrak, as Mr. Riley just indicated. And, first
22 of all, thank you for seeing us today. I know the
23 Court's read the papers, so I'd like to just start by
24 asking if there's any specific questions or anything
25 you'd like me to address, otherwise I'll just hit some

1 key points.

2 THE COURT: I do have a couple of questions,
3 so thank you, Mr. Zebrak. And maybe what makes more
4 sense to do is just to wait until -- because most of my
5 questions were about some of the later discovery
6 requests. And the question is, largely, to have both you
7 and whomever's going to speak on behalf of the defendant,
8 explain to me what you think the difference is between
9 the two proposals. Because I'm sure there is some
10 difference or distinction, but it's not immediately
11 apparent from the -- from Exhibit A.

12 So maybe it just makes more sense for you to
13 go ahead and go through whatever remarks you were going
14 to make and then, as we get to those specific discovery
15 requests and responses, I'll raise those questions.

16 MR. ZEBRAK: Very well, Your Honor. Thank
17 you.

18 So as the Court's aware, the parties have
19 had quite substantial back and forth, and we've already
20 reached a number of compromises. With respect to the
21 matters that remain for resolution today, primarily we're
22 here over a dispute about relevance. Obviously concepts
23 of proportionality, you know, bear upon what the ultimate
24 production will be, but as -- I hope Your Honor will see
25 as I walk through these requests in a moment, we think

1 the other -- the other side's complying with what some
2 courts have referred to as a smoking gun standard.

3 Albeit a sensational term, what that, of
4 course, means is that what some parties do is they say
5 documents are irrelevant and don't need to be produced
6 unless they're a smoking gun. And in many ways that's
7 what's happening here, where the defendant's saying,
8 unless a particular piece of discovery is going to
9 establish one of the elements of affirmative liability,
10 there's no relevance to it. And, of course, relevance is
11 a much broader standard than that. And the application
12 of how defendant proposes to proceed here would really
13 deprive the Court, the jury and plaintiffs of key
14 evidence in the case.

15 THE COURT: I think you can take some level
16 of satisfaction, Mr. Zebrak, in what I'm about to say,
17 which is that I do not think in this case, or in any
18 other case, frankly, that the standard for discovery in
19 federal litigation is a smoking gun one. It is a very
20 broad standard of discoverability.

21 And in some respects the limited cases that
22 were cited in the parties' joint discovery dispute
23 statement fall into the same trap, pothole, whatever
24 metaphor you want to use, that they are not cases that
25 necessarily with discovery -- I understand why the

1 plaintiff cited those cases because they deal with
2 standards. But very often parties, as has the defendant
3 here, cites to cases in which the issue is admissibility
4 of evidence for trial purposes or summary judgment
5 purposes or their case on appeal where a summary judgment
6 was reversed because of improperly-relied-upon evidence.
7 And those are very different standards, as you know. The
8 standard for admissibility and discoverability are two
9 very different standards. And I am not going to consider
10 cases in which the evidence may have been included at
11 trial or excluded for summary judgment purposes, either
12 before or after a motion for summary judgment was
13 considered. I am going to apply the very broad standards
14 for relevancy.

15 And I think in this case you-all are even
16 one step further than that because Judge Trauger has
17 already told you what she thinks are relevant for
18 purposes in this case, and it is not -- I guess that is
19 my frustration with the amount of time that is being
20 spent on this discovery dispute.

21 Because Judge Trauger has already said that
22 notwithstanding her dismissal of two of the kinds of
23 claims of Counts One and Three, that she clearly said
24 that X Corp's powers of monitoring and control over users
25 and their tweets are relevant to the inquiry of whether

1 what and to what extent X Corp may be liable for the
2 infringing acts of users on its platform, as are X Corp's
3 economic incentives to tolerate infringement, whether or
4 not one resorts to the concept of vicarious rather than
5 contributory infringement.

6 And the Court's decision to permit Count Two
7 to proceed with regard to certain challenged policies
8 means that those issues are still part of the case.
9 She's already made a determination that relevancy is
10 broader just than evidence that might directly establish
11 the elements of Count Two.

12 And I -- again, I am at a little bit of a
13 loss to understand why we are here today, why all of the
14 resources of the parties -- I understand why the
15 plaintiff is here today. I guess this is really more a
16 question for Mr. Harbison and his co-counsel about why
17 there is so much -- so many resources and so much time
18 being spent on an issue that seems to me to be pretty
19 clearly within the scope of what Judge Trauger has
20 already said is relevant discovery in this case.

21 So you can be assured that you don't have to
22 spend much more time arguing to me about the --

23 MR. ZEBRAK: Sure.

24 THE COURT: -- impropriety of a smoking gun
25 standard because I am not going to apply in this case, or

1 really in any case, a smoking gun standard. I understand
2 there are courts that think that's an appropriate
3 standard. This Court is not one of them.

4 MR. ZEBRAK: Thank you, Your Honor. So just
5 by way of sort of setting the stage a little bit before
6 we get to the specific three categories, Judge Trauger's
7 decision, as Your Honor's aware, addressed each of the
8 three claims that we alleged in the case. And in going
9 through that, Judge Trauger indicated and reinforced that
10 the idea of liability platform-wide just for all
11 infringement that occurs where the defendant only has
12 general knowledge that it may be happening somewhere,
13 that that doesn't suffice. That wasn't our allegation,
14 and it's not our allegation.

15 Our allegation here for contributory
16 infringement is about the specific infringers'
17 infringements that we told the defendant about. But, of
18 course, that happens. It doesn't occur in a vacuum. It
19 occurs against the backdrop of what defendant knows about
20 what users are doing on its platform and what it's
21 promoting in its strategy documents.

22 You know, Judge Trauger didn't say that the
23 defendant's general knowledge about use of music and the
24 types of things users are doing with music, even if the
25 defendant doesn't regard it as infringing, she didn't say

1 that that's all off limits. That's the kind of stuff
2 we're getting at now where -- you know, the specific
3 liability in the case may hinge on what did the defendant
4 knew about specific infringers and infringements, but for
5 lots of issues in the case, aside from establishing those
6 specific elements of liability, as Judge Trauger already
7 alluded to in making clear what her decision was in
8 taking off the table, you know, from our perspective, the
9 idea that -- you know, under the defendant's logic here,
10 they would withhold documents reflecting that they know
11 of massive infringing activity as long as they don't
12 regard it as infringement.

13 THE COURT: I don't disagree with you about
14 that.

15 MR. ZEBRAK: Okay.

16 THE COURT: And they're going to have to
17 explain to me why it is that any defendant in any
18 litigation in discovery gets to decide whether the
19 discoverable information satisfies the ultimate elements
20 of the claim.

21 MR. ZEBRAK: Yeah.

22 THE COURT: Because that's not the way
23 discovery works in federal litigation.

24 MR. ZEBRAK: Yeah. So I'll go through the
25 three categories quickly.

1 THE COURT: Sure. Let me ask you one
2 question before you start. Is there an agreement that
3 the relevant discovery period is from December 1 of 2021
4 through June 14 of 2023?

5 MR. ZEBRAK: We have -- sometimes --

6 THE COURT: Or has there been an agreement
7 to limit discovery to that period? Maybe that's the
8 better way to pose that question.

9 MR. ZEBRAK: There is a default period that
10 we're using, and I believe Your Honor referenced it
11 correctly. But that's not for all requests per se.

12 THE COURT: Okay.

13 MR. ZEBRAK: When it comes to certain
14 requests, there may be reasons to go earlier. A lot of
15 that will just be negotiated by the parties, but this
16 dispute right now hasn't been an issue about time period
17 at all. Thus far -- and I think the time period where
18 that would arise would be on issues of -- if it became
19 too burdensome and you wanted to cabin what the defendant
20 was searching or producing to a particular time period,
21 we'd be happy to get into that.

22 THE COURT: Right. Well, they've raised --
23 the defendant has raised that issue in a -- with
24 respect -- at least in the original objections, in the
25 initial objections --

1 MR. ZEBRAK: Yes.

2 THE COURT: -- raised that issue with
3 respect to multiple of the requests that remain in
4 dispute, but maybe that's no longer an issue. Maybe the
5 other issues have --

6 MR. ZEBRAK: Yes.

7 THE COURT: -- sort of risen to the surface
8 as the primary ones that will be determinative of the
9 outcome.

10 MR. ZEBRAK: Yes, Your Honor. Initially the
11 defendant had very extensive objections that we've worked
12 through in many respects, including with respect to the
13 time period that's being applied for various requests as
14 a default. So that's -- that's not an issue for today.

15 Today really, I think, Your Honor --
16 hopefully once Your Honor resolves the issue of relevance
17 and that something needs to be produced here, I think all
18 the issues will sort of resolve themselves, you know, at
19 that point after. You know, from our perspective -- and
20 I'm going to jump right into the three categories.

21 THE COURT: Sure.

22 MR. ZEBRAK: You know, the defendant has,
23 after quite some time, proposed compromises on these
24 requests. For a long period of time it was not just
25 producing anything. Then indicated -- it tried to modify

1 these requests to have it apply with respect to what it
2 regarded as infringing content or infringing activity.

3 You know, from our perspective, that's not a
4 workable solution because, you know, whether the
5 defendant regards it as infringing or not, of course,
6 that's important, but that's not the ceiling on
7 relevance. You know, the defendant can't explain what it
8 would look for there unless, you know, they'd know it
9 when they'd see it.

10 From our perspective, you know, our view is
11 that most infringers don't call out when they know --
12 when they know a whole category of content is highly
13 infringing or routinely infringing. We're interested in
14 knowing what they knew, what they did, what they were
15 promoting, not just whether they regarded that as
16 infringement. And so let me -- if it makes sense, just
17 jump to the three categories.

18 THE COURT: Sure. Go ahead.

19 MR. ZEBRAK: For the first category, what
20 remains -- so the plaintiffs referred to this as
21 monitoring and control requests. The defendant has
22 referred to what remains at issue as content moderation
23 requests. And this concerns one RFP and one
24 interrogatory.

25 I should perhaps start with the

1 interrogatory because I think this is real easy. The
2 defendant has agreed to produce an org chart with the
3 same subject matter if it exists, but refuses to answer
4 interrogatory to name a couple of people on the same
5 topic. And we just think that's silly. You know, of
6 course, if the org chart's sufficient, if they have one
7 to produce, that would be fine, but we can't be out of
8 luck if there isn't such a document.

9 So -- but let me turn to the more -- the
10 subject matter --

11 THE COURT: So go back there -- go back just
12 a moment to what you said. The defendant's position from
13 the November 8, 2024, letter was that X will identify
14 persons with knowledge of programs or tools to monitor
15 the site for copyrighted music on the platform.

16 So they're not agreeing to do that now?

17 MR. ZEBRAK: I'm sorry, perhaps I -- I
18 thought that would be a tidier category to start with,
19 but I may have done that in a way that's more confusing.
20 So if I could start again --

21 THE COURT: Sure.

22 MR. ZEBRAK: -- that might streamline this.

23 The defendant's current position on the
24 interrogatory is as Your Honor just stated. And the
25 defendant correctly listed its current position in its

1 segment of the joint statement on the RFP.

2 But let me tell you why the proposed
3 narrowing of our interrogatory and RFP is problematic.
4 The RFP is -- and I'm paraphrasing now -- it's looking
5 for documents that are going to show or describe what --
6 what tools they're using or programs they have in place
7 to monitor or control users and the content that are
8 uploaded by users. That's the RFP. Of course, there's a
9 spectrum of relevance. You know, what's most relevant is
10 what they're doing and not doing in the area of
11 copyright, but there's other -- other issues too.

12 So let me begin by telling the Court what we
13 think the defendant's document response would exclude,
14 because the defendant is indicating they're going to
15 provide documents sufficient to reflect use of these
16 technologies or practices to detect or limit copyrighted
17 music in posts or streams.

18 So it would -- defendant's response would
19 exclude three or four things that we think are easily
20 relevant. One would be tools that the defendant
21 considered using but didn't adopt about copyright
22 infringement of music. You know, the defendant's
23 capabilities for reducing infringement are not just what
24 they put into place but also what they didn't put into
25 place, but perhaps what they were aware of. So that's

1 one item.

2 Another one is what tools defendant is using
3 to detect or limit copyright infringement outside of
4 music. Maybe, for example, the defendant does something
5 in the area of movies that it's not doing for music but
6 easily could. But, you know, we're going to find out,
7 because it makes much more money off of this uploading
8 and streaming of music, it's not doing that other stuff.

9 So one is outside of music in the area of
10 copyright, and the other is things that the defendant
11 considered but didn't adopt.

12 And likewise, defendant has some policies
13 about trademark and counterfeits, which, again, if there
14 are some tools or monitoring programs that defendant's
15 doing in the area of infringement that could easily be
16 applied for copyright, that's something we'd be
17 interested in and we think would be relevant. Again, by
18 way of depth, we don't need, you know, detailed emails
19 and all that stuff. We're talking probably about
20 presentations, guides, summary-level documents.

21 And then I just mentioned things that the
22 defendant would exclude by way of sort of subject area.
23 The other thing I'd like to mention is something that's
24 agnostic to the -- to the issue. Defendant makes
25 reference to hate speech and other areas. We're not

1 interested in exploring what it does across its site as
2 to all the trust and safety issues in toto.

3 But one issue in this case, Your Honor, is
4 the fact that defendants, if they do suspend someone,
5 people sign back up under new accounts. And one thing
6 that many platform providers have are tools that they use
7 typically to relate accounts together. So if they ban
8 someone and want to keep them off the platform, how do
9 they figure out if someone's signed back up.

10 So this isn't specific to a given subject
11 area, but if they have tools that help them identify and
12 relate or flag accounts and users to see if they're
13 signing back up, these are the kinds of things that would
14 be excluded from the defendant's current proposed
15 response.

16 As Your Honor indicated before, the Court
17 already indicated that X's powers of monitoring and
18 control over users and their posts is still relevant to
19 the case even though vicarious isn't there anymore. And
20 we're interested in the things I just mentioned beyond
21 what defendant's offering to do because it's all relevant
22 to whether the defendant took reasonable steps in
23 response to the specific infringers and specific
24 infringements that we've identified to it.

25 So it's not a platform-wide theory of

1 liability. It's -- you know, it's what tools could they
2 have used or that -- you know, once we told them of these
3 issues.

4 THE COURT: And you are -- just to confirm,
5 you're interested in summary-level documents, not
6 necessarily -- or not even including a custodian email
7 search, anything like that. So what if they tell you
8 there are no summary-level documents?

9 MR. ZEBRAK: Yeah. So I suppose then we'd
10 be out of luck, but I find it hard to believe that there
11 aren't such things. It could be a PowerPoint
12 presentation. I'd imagine that, you know, the trust and
13 safety group there probably has some presentations and
14 guides and training materials that it uses to explain to
15 its staff or to its business stakeholders about what it
16 does and doesn't do.

17 You know, I think also, quite frankly,
18 Your Honor's request is a difficult one for me to answer,
19 in the sense that there will be plenty of areas where
20 custodian email searches is important to us in this case.
21 This area is probably not one of them, but --

22 THE COURT: I was only speaking about this
23 particular --

24 MR. ZEBRAK: Yeah, yeah.

25 THE COURT: -- RFP No. 56 and related.

1 MR. ZEBRAK: Sure. Well, thus far
2 defendant -- I mean, this would have been easy if
3 defendant said -- you know, they're in touch with this
4 trust and safety group and people in it. They haven't
5 represented to us that these things don't exist. Their
6 issue is we're not going to assess if things exist or
7 burden because none of it's relevant. So we haven't been
8 able to get past go on this.

9 THE COURT: So if we -- if this wasn't --
10 and it is not my preference to rewrite discovery requests
11 in the context of a discovery hearing.

12 MR. ZEBRAK: Sure.

13 THE COURT: It's like doing committee work
14 at a board meeting. But if this was rewritten to state,
15 summary-level documents sufficient to show or describe
16 the tools, programs or methods, et cetera, would that --
17 does that change the plaintiff's agreement to proceed
18 with the revised request for production?

19 MR. ZEBRAK: It's fine with us, Your Honor.
20 Our view on this is that we're interested in unearthing
21 what they have and we're more than happy to cooperate on
22 levels of depth on searching and if it turns out that
23 there's a bunch of volume to it, but right now it's
24 been -- there hasn't been negotiation over this. So that
25 would be fine with us, Your Honor.

1 Getting to the interrogatory, you know,
2 we've asked for essentially people with responsibility or
3 involvement with respect to the area we've just been
4 talking about. And we've made --

5 THE COURT: And so the difference is that
6 they only want to ask -- they only want to provide
7 details of people who monitor the site for copyrighted
8 music. Is that --

9 MR. ZEBRAK: Correct. Again, not even
10 copyright generally, but copyrighted music. And our view
11 is the power of monitoring and control they have is
12 broader than just on the issue of copyrighted music.

13 As to the interrogatory, you know, we're
14 not -- we suspect that lots of people touch this issue
15 and we've articulated, we're looking for a name or two
16 here to depose on these issues. And they've agreed to
17 provide an org chart under RFP 44. You know, it doesn't
18 match this language exactly, but it hits a bunch of the
19 issues we've been talking about. And so, you know, we
20 haven't understood why they provided the org chart but
21 not the interrogatory answer which we'd, of course, need
22 if there isn't such documents.

23 Unless the Court has other questions, I'd
24 just move to the next set of --

25 THE COURT: No, I don't have any other

1 questions. Thank you.

2 MR. ZEBRAK: So, Your Honor, again, the
3 defendant's joint statement and the position they've been
4 taking is that our discovery requests are consistent with
5 the theory that the Court rejected, meaning that they're
6 responsible for all copyright infringement that happens
7 just because they know it happens somewhere, some way and
8 that they allow music. That's not our theory of the
9 case.

10 Our position on these economic requests is
11 that what they can't do is withhold documents that
12 reflect, you know, that their platform is riddled with
13 music uploads, that the defendant promotes it, generates
14 money from it, derives engagement off it, perhaps even
15 gets into the different types of music uploads there are
16 and indicates that this is what users want to do, but yet
17 the defendant's going to withhold all that unless in
18 those documents defendant recognizes and regards that the
19 content and its activity or the user activity is
20 infringing.

21 We just think that's a stunning position,
22 and it -- you know, it really defies -- you know, we
23 can't expect that they're going to -- first of all,
24 they're not the arbiters of what infringement is or is
25 (sic). I mean, it's relevant what they understood, but,

1 you know, we want to know the things they knew and the
2 things they were doing, not just if they regarded it as
3 infringement.

4 You know, we're entitled to rely on
5 circumstantial and direct evidence, and we think these
6 requests -- I'm happy to go through them or some of them
7 in specifically, but these all relate to their economic
8 incentives. And -- you know, and we'll explain why the
9 defendant acts the way it does in response to
10 infringement notices. And, you know, defendant's
11 awareness that massive infringement is happening we think
12 is very relevant to the case, even if it's only going to
13 be responsible for some of it.

14 The defendant has a little bit of slight of
15 hand in their joint statement where they talk about how
16 there are millions and billions of posts about music.
17 And they talk about that as if that's going to speak to
18 the burden of this.

19 This document request, Your Honor, is about
20 use of the uploads of music and the streaming of music in
21 these, in these video files. It's not about discussion
22 of music. You know, it's not about defendant's awareness
23 that millions of users are discussing music. It's about
24 the infringing activity. And it's also, quite frankly,
25 about defendant's claim that, you know, these uploads

1 could be licensed by the user or owned by the user or
2 de minimis or fair use. We'd like to see what their
3 documents reflect about what they knew and were saying
4 about the nature of these uploads.

5 So -- and, again, from our perspective, you
6 know, liability will hinge on the infringers and the
7 infringements, but all these other documents or the
8 context in which its happening and -- will be very
9 relevant to other issues in the case, including a need
10 for deterrence and defendant's motives for why it's
11 acting the way it did and the issues of willfulness as
12 well as some of defendant's pled affirmative defenses,
13 including fair use, where we're going to want to
14 understand the nature of who users are and the types of
15 things they're doing with music and what they want to do.

16 So -- and, again, we don't see this as an
17 issue of burden either. We're -- we do recognize that
18 many people may touch these issues, but that's where the
19 parties often negotiate to something narrower in the
20 scope of the search of the production. And we said we're
21 happy to do that.

22 Again, you know, we would imagine the types
23 of things we're talking about here, Your Honor, from past
24 experience in litigations like these, are PowerPoint
25 presentations, reports, consumer studies, surveys,

1 strategy documents where they're going to say -- and this
2 gets into the last set of requests in a moment, but, you
3 know, these sort of -- you know, these aren't
4 communication-level documents.

5 Does Your Honor want me to address any of
6 the specific requests or should I leave that at the sort
7 of high level of --

8 THE COURT: I think probably you've
9 addressed all of the questions that I might have had for
10 you, but let me...

11 With respect to Interrogatory No. 1, one of
12 the objections -- and leaving aside infringing, I'll
13 discuss that issue with defense counsel. But the use of
14 music, is there some disagreement over what use of music
15 means?

16 MR. ZEBRAK: Well, let's, I think, get past
17 the issue of are we talking about people just discussing
18 music or not --

19 THE COURT: Right.

20 MR. ZEBRAK: -- that's not the type of --

21 THE COURT: And is that the issue that --

22 MR. ZEBRAK: Well --

23 THE COURT: Because it was not my
24 understanding that that is what you were -- my
25 understanding was the way you've just described it, that

1 you were looking for uploads, streaming, those kinds of
2 things. Not discussion about music, not, you know,
3 comments about music, not critiques of music, that kind
4 of thing.

5 MR. ZEBRAK: Right. So, Your Honor, to
6 that -- I think the issue here is that the defendant for
7 discovery purposes wants to say that documents about use
8 of music are simply not discoverable. They're not
9 relevant because unless it's infringing use of music it's
10 not relevant. And what it's trying to do is, we think,
11 apply a cramped reading of Judge Trauger's motion to
12 dismiss order where the Court indicated that, you know,
13 all use of music isn't infringing use of music. Of
14 course, that's not our position. But our position is,
15 you know, much of it is.

16 And, in fact, you know, the -- we'd like to
17 see what their documents reflect about what they know
18 about the types of uses of music happening because, from
19 our perspective, the things we indicate in the complaint
20 we're talking about are uploads of music videos,
21 commercial music videos or synced videos where commercial
22 music is paired with video or concert footage.

23 It's not going to be the case that
24 defendant's documents will necessarily tag that activity
25 as infringing. And our view is we want to understand

1 who's been in charge of these issues and, you know --
2 that it's all going to be relevant to, you know, even if
3 use of music specifically doesn't establish the
4 liability.

5 So -- so anyway, so that's -- that's, I
6 think, where we stand on --

7 THE COURT: Well, if I remove the
8 defendant's proposed I suppose -- but maybe proposed is
9 too generous a description. But if I delete infringing
10 use of music and it's just use of music, is that going to
11 resolve the issue with respect to at least some of these?
12 With respect to Interrogatory No. 1 and maybe some others
13 that if it's just use of music as was originally --

14 MR. ZEBRAK: Oh, Your Honor --

15 THE COURT: -- described --

16 MR. ZEBRAK: Excuse me. Yes, Your Honor.
17 That would -- that would more than suffice. You know,
18 defendant's going to point out that, you know, that there
19 may be some lawful activity that they're doing with
20 respect to use of music. You know, for instance, I don't
21 know, partnering with respect to some promotional program
22 with someone. You know, of course -- you know, there are
23 going to be edge cases and other things that, you know,
24 aren't going to go toward us proving our claim, but that
25 doesn't mean we sort of throw the baby out with the bath

1 water, as the expression goes.

2 THE COURT: Well, and that's exactly the
3 reason why there's a difference in standards in
4 discoverability of information and admissibility of
5 information because admissibility -- it could be
6 inadmissible for any number of reasons. Inadmissibility
7 based on relevance grounds at trial is a very different
8 standard than relevancy for discovery purposes.

9 MR. ZEBRAK: Right.

10 THE COURT: And I'll hear from defendant's
11 counsel about that.

12 MR. ZEBRAK: Yeah. And I think the last
13 thing here is, you know, defendant's going to point out
14 that the Court said that the mere existence of a feature
15 about music isn't a premise for liability. And that
16 isn't our theory for liability here, but we do want to
17 see what the defendant knows about actual uses of the
18 feature. That's what we want to ask people about and see
19 what the documents reflect.

20 So if I could, Your Honor, I'll skip the
21 specific requests but be happy to come back to that
22 later, if necessary. And I'll just cover the last set of
23 requests here. We fully understand that, of course,
24 defendant's going to have lots of documents about how it
25 competes in the marketplace. We're not looking for all

1 of them. We're looking for documents where defendant is
2 depicting its strategies and analyses about how it can
3 make changes to its platform and what practices it can --
4 it can engage in to be more like the licensed music sites
5 that we've cited in our pleadings and that the Court
6 cited.

7 You know, from our perspective, again, we're
8 not suggesting that they're going to be liable because
9 they had this plan, but we think it's very relevant to
10 the other issues in the case that the defendant
11 recognizes that this activity at issue is going to be
12 infringing because of the absence of these licenses. And
13 it's courting the very same users that are uploading this
14 music to other platforms because it's licensed there and
15 they're courting these users to do the same thing on
16 their platform, but because there's no license, it's
17 infringing.

18 You know, those are the types of documents
19 that the defendant would withhold. It would, under its
20 proposed logic where it's trying to limit it to practices
21 to promote infringement or infringing content, so the
22 defendant -- you know, if there's a document showing that
23 its strategies to compete with competitors, you know,
24 with respect to uploading and streaming of music, it
25 would -- it would withhold that as long as the defendant

1 in that document didn't say, oh, and we know that this is
2 going to be infringing content or that these users are
3 engaged in infringement.

4 So we'd like the ability to receive those
5 and have our experts consider them, and we think they're
6 going to hit these issues that go to the other -- you
7 know, the other facets of the case.

8 THE COURT: All right. Thank you very much.

9 MR. ZEBRAK: Thank you, Your Honor.

10 THE COURT: All right. Let me hear from
11 whichever counsel on behalf of defendant, please.

12 MR. SHAPIRO: That would be me, Your Honor.

13 THE COURT: All right. Come on up.

14 Mr. Shapiro, is it?

15 MR. SHAPIRO: Yes.

16 THE COURT: All right.

17 MR. SHAPIRO: And, Your Honor, I want to
18 echo Mr. Zebrak's appreciation to you for taking the time
19 to hear us on these.

20 THE COURT: Sure.

21 MR. SHAPIRO: And if I may -- and I've been
22 hearing you loud and clear and reading the tea leaves as
23 lawyers do.

24 THE COURT: Good.

25 MR. SHAPIRO: But if I could take a moment

1 or two to do a little bit of context setting --

2 THE COURT: All right.

3 MR. SHAPIRO: -- and framing, just at the
4 outset.

5 We are definitively not asking the Court to
6 apply a smoking gun standard. That is -- that is not our
7 view. It is not our position. But I think if smoking
8 gun standard is at one end of the spectrum of
9 impermissibility, at the other end, equally
10 impermissible, is a shotgun standard in which a party
11 says, well, we just want everything. And that's the type
12 of gun that we are saying would be improper to be used
13 here.

14 And I think one of the most important
15 documents before the Court right now is our Exhibit B,
16 Exhibit B to the joint statement, because I think if --
17 if one were coming to this dispute or this hearing
18 reading only the joint letters and listening to the
19 statements of my brother, Mr. Zebrak, one might think
20 that X is refusing to produce anything meaningful in this
21 case.

22 THE COURT: I am not thinking that at all,
23 Mr. Shapiro. I am pleased that this is not an argument
24 about not producing any kind of information. And it's
25 clear that X Corp has agreed to produce a wealth of

1 information.

2 But a party's compliance with its discovery
3 responsibilities, to some extent, even to a great extent,
4 does not mean that that party necessarily gets a pass on
5 other information that falls within the scope of the
6 discovery rules. Because complying with your discovery
7 obligations without dispute is what's expected of every
8 party. And this is not -- not that I'm disparaging any
9 kind of litigation that happens in federal court, but
10 this is certainly not the simplest case that any of the
11 judges in this court have before them. And, frankly, the
12 discovery requests and the agreement to produce discovery
13 in this case is not surprising to me, and it's not -- nor
14 is it particularly impressive given the -- and I mean
15 impressive in terms of me saying, oh, well, X Corp has
16 agreement to produce so much information that it's not
17 unreasonable for them to draw the line somewhere.

18 Because this is the kind of information,
19 exactly the kind of information that I would have
20 expected that a defendant in this kind of litigation,
21 particularly one of the scope of business and resources
22 of X Corp, would agree to produce with the issues that
23 are before the Court.

24 So don't -- don't concern yourself that I'm
25 under any misapprehension that X Corp is being totally

1 obstreperous in this case. If that was what you
2 understood from my earlier comments, then I want to
3 clarify that, that I do not think that X Corp is -- has
4 strong-armed the plaintiffs on producing discovery of any
5 kind.

6 I think that you-all have worked very hard
7 to -- to reach agreements about discovery that both sides
8 agree is relevant and discoverable. And I think you've
9 worked hard to try to come to some agreement about the
10 remaining discovery, but I do think that there is --
11 there are a lot of resources being spent on this
12 remaining discovery that -- that may not necessarily be
13 justified, but I'm going to give you a chance to try to
14 convince me otherwise.

15 MR. SHAPIRO: It's always worth a try,
16 Your Honor.

17 THE COURT: It is.

18 MR. SHAPIRO: And I appreciate and
19 acknowledge what you said a moment ago, which is,
20 absolutely, the fact that we have reached agreement on
21 some number of issues doesn't -- isn't decisive one way
22 or another -- whether we're right or wrong on the
23 remaining issues.

24 But there's another aspect to I think this
25 Exhibit B, because I think what Exhibit B reflects, at

1 least in my view, is the extent to which the issues that
2 are really at the core of this case, under the broad
3 discovery standard of the federal rules, have been
4 addressed and agreed to by the documents that X is
5 already agreeing to produce. And most of what we're
6 arguing about here are, on the one hand, I think going to
7 be edge cases or edge points for the plaintiff's case
8 but, nevertheless, would be asking X to dig through whole
9 swaths of material for very limited potential benefit to
10 the plaintiffs.

11 THE COURT: Well, I'm not so sure that
12 Judge Trauger thinks it's of limited benefit. Of course,
13 I don't speak for Judge Trauger and she -- you know, if
14 this matter gets in front of you, she'll certainly tell
15 you whether any of us have correctly construed what she
16 meant.

17 But my reading of Judge Trauger's memorandum
18 opinion is that she found it necessary to go to the
19 extent of stating that they -- that powers of monitoring
20 and control over users and their tweets are relevant to
21 the claim that she declined to dismiss and that the
22 dismissal of the two other claims -- again, this is my
23 extrapolation of her order, but the two -- dismissal of
24 the two other claims should not be construed as a
25 determination -- in fact, she went out of her way to say

1 it was not a determination that information that might
2 have been -- and I'm going to use the word directly in
3 quotation marks, but more directly related to those other
4 claims is not necessarily no longer relevant.

5 There must have been a reason. I mean,
6 judges don't ordinarily include comments, include
7 expressions of their thoughts in their orders without
8 there being some reason for that. And my interpretation
9 of Judge Trauger's statements in her order is that she,
10 because she's very, very bright and -- that she predicted
11 that this might be an issue and she wanted to make clear
12 to all of us, the parties especially, and anybody else
13 who might be looking at it later whether that was me or
14 whether it was her looking at it at some later time after
15 she looked at maybe hundreds of other cases and no longer
16 had immediate recall of this one, that she was not saying
17 that the dismissal of those two other counts meant that
18 information that might have been more willingly --
19 discovery that might have been more willingly produced
20 with those two counts remaining in the case was no longer
21 discoverable. I think that she went out of her way to
22 say just the opposite.

23 MR. SHAPIRO: 100 percent, Your Honor. And
24 that is why, as reflected in Exhibit B, X has agreed to
25 produce, for example, in response to RFP No. 7, documents

1 sufficient to identify policies and procedures concerning
2 copyright infringement by platform users;

3 RFP No. 9, documents concerning its analysis
4 of the adequacy of its copyright infringement policies;

5 No. 10, documents sufficient to show
6 policies, practices, procedures and processes, as well as
7 related guidelines, training materials, interpretations
8 of policies that X has adopted concerning DMCA notices
9 and counter-notices;

10 RFP 15, documents sufficient to reflect
11 and/or explain how X receives, processes and/or tracks
12 infringement notices. X will also produce summaries and
13 analyses of how X's system for infringement notice
14 tracking is working, including any reports on
15 deficiencies.

16 No. 20, documents sufficient to reflect the
17 reactivation of services for any platform user whose
18 account was permanently suspended or terminated pursuant
19 to X's DMCA policy. X will also produce ticket data,
20 case data reflecting suspensions, custodial documents.

21 I could go on, 20, 21 -- excuse me, 21, 22,
22 28, 29, 30. All of those are responsive to that
23 statement by Judge Trauger about our ability to control
24 and monitor the site. I think she doesn't want us coming
25 in and saying "all of those things are off limit." But

1 the motion to dismiss order, which severely narrowed the
2 case, has to mean something, I would submit, regarding
3 discovery.

4 So if the case now -- I'm not saying that
5 this is the whole universe, but if the heart of the case,
6 what the plaintiffs are asked to prove here, is whether X
7 did one of these three things listed at the end of the
8 motion to dismiss or in the order on the docket, No. 1,
9 providing more lenient copyright enforcement to verified
10 users, No. 2, failing to act on take-down notices in a
11 timely manner, and No. 3, failing to take reasonable
12 steps in response to severe serial offenders, it's pretty
13 easy to see what discovery could and should look like in
14 a case where those are the three things you're trying to
15 prove. That doesn't mean that only documents or evidence
16 going to those three things is discoverable, but that's
17 the core.

18 And it is the plaintiffs, we feel, who are
19 turning this into a needlessly burdensome and inefficient
20 case. They are going to want to prove that we're
21 providing more lenient copyright enforcement to verified
22 users.

23 We are answering all of that. We're giving
24 them all the documents on that. They're going to be
25 asked to prove whether we're failing to act on take-down

1 notices in a timely manner. We're responding to all of
2 that. We're giving them the smoking gun that they need
3 if it's there. They're going to be asked to prove if
4 we're failing to take reasonable steps with regard to
5 severe serial infringers. We're giving them all of that.

6 THE COURT: Well, what I don't understand
7 about some of your -- some of the defendant's position on
8 these requests for production, Mr. Shapiro, is that
9 there's -- at least the attempts at resolution have
10 resulted in an acknowledgment by the defendant that you
11 will produce some of this information as it concerns the
12 use of infringing music.

13 Well, to me, that's even more burdensome.
14 If you're going to compile the information and then make
15 a determination -- well, I think there's two issues, one
16 of which is the one that Mr. Zebrak described, which is
17 that whether it's proper for a party to -- for a
18 defendant to make a determination about whether something
19 is -- constitutes the very issue that's elemental to the
20 case or at the crux of the case.

21 But even setting that aside and viewing this
22 in terms of burdensomeness, it's even more burdensome, is
23 it not, for -- if you're going to compile all of this
24 information anyway for the defendant then to make a
25 determination about whether that information is

1 infringing or not in an effort about what has to be
2 produced and not produced. So I don't think that the
3 burdensomeness is particularly -- a particularly
4 compelling issue. Maybe -- maybe relevance.

5 Although one thing that I do want to have
6 happen is I want to see all of the discovery requests and
7 responses because I don't have the specific
8 interrogatories and requests for production that are not
9 in dispute. I have the ones in Exhibit A, and then I
10 have a general description in Exhibit B. But it occurs
11 to me that there may be sufficient overlap in what --
12 although you-all are very good lawyers. I suspect if
13 there was sufficient overlap, we wouldn't be here today.

14 But it may be that what I find is that there
15 is enough overlap in what X Corp has already agreed to
16 produce in response to some other requests for production
17 that what the plaintiffs continue to request is just
18 superfluous or more of the same kind of thing. So I do
19 need to see all of the discovery requests and responses.
20 Can you go ahead and just file those as a supplement to
21 today's proceeding?

22 MR. SHAPIRO: Yes. We're happy to do that.

23 THE COURT: Okay. And then I interrupted
24 you, Mr. Shapiro. Go ahead. If you can get back to
25 where my train of thought was, good luck.

1 MR. SHAPIRO: No, I certainly can. And I
2 think you've characterized it in a way that's consistent
3 with what we're saying here. And reason I started with
4 this Exhibit B is we're providing most of it, at least in
5 the ways that are relevant to the case already.

6 But asking us to go and find everything
7 relating to music or even uploads of music, whatever it
8 might be, that anyone has discussed or considered at
9 X Corp is simultaneous --

10 THE COURT: I'm not sure it's that broad,
11 though. And I think that's where the sort of ships
12 passing in the night comes in, Mr. Shapiro. I don't
13 think it's everything that anyone may have discussed or
14 considered. That's why I wanted to be very specific with
15 Mr. Zebrak about what it was that was being requested and
16 that it is these summary-level, not communication-level
17 documents.

18 So that's something different. It's not
19 a -- it is not a custodian records search. It is a
20 wherever X Corp maintains summary-level documents, it's
21 that kind of a search. And it's not every communication
22 in which that might have been discussed or considered.
23 It's, you know, what are the final documents that those
24 discussions or considerations produced and not all of the
25 work materials that went into the production of those

1 documents.

2 And I do think there's a difference in terms
3 of burdensomeness. There may be even a difference in
4 terms of relevancy, but certainly in terms of
5 burdensomeness with respect to those two kinds of
6 documents. So that's why I wanted to be very specific
7 with Mr. Zebrak about that. So I don't think that
8 they're requesting everything that any person has
9 discussed or considered with respect to this additional
10 categories or topics.

11 MR. SHAPIRO: That's fair, Your Honor. I'm
12 looking at page 23, this is our portion of the joint
13 statement where we've prepared a chart. And I found when
14 I was preparing for this hearing that our -- we've laid
15 out in charts, you know, what the request and what our
16 proposed compromise is on each of -- I find that's, in
17 some ways, an easy way to follow it.

18 So I'm looking at page 23 of Docket No. 109.
19 And the plaintiff's request was all documents and
20 communications, including reports, studies, research,
21 presentations, surveys or analyses concerning the use of
22 music on the platform. And I hope that the Court can
23 see -- maybe it's now been narrowed orally by Mr. Zebrak,
24 but I hope the Court can see why that's sweepingly broad
25 and we feel not appropriate to the needs of this case as

1 narrowed by the motion to dismiss.

2 THE COURT: Well, it is broad, all documents
3 and communications. But I think Mr. Zebrak has narrowed
4 it. I think he did that before and I think he's
5 certainly done it today and confirmed with me that it is
6 summary-level documents, not communications-level
7 documents. But I think where the real point of departure
8 occurs is not what the kind of documentation is, but what
9 X Corp is willing to produce, which is only with respect
10 to some determination it makes of whether that is
11 infringing music or not.

12 MR. SHAPIRO: So let me take a run at that.

13 THE COURT: Okay.

14 MR. SHAPIRO: So there's the burden point
15 and there's -- there's the relevance point. And
16 Mr. Zebrak and his firm and I and my firm, we've been on
17 opposite sides in cases sort of similar to this, and the
18 fact is it is not at all unusual, unfortunately,
19 sometimes for our clients, for there to be documents in
20 which -- maybe the word infringing is a little narrow, we
21 could change it to unauthorized -- in which there are
22 documents or presentations in which a company's saying,
23 wow, we've got a lot of unauthorized music. Or I've had
24 a case where it was movies, we've got a lot of
25 unauthorized videos up here. What are we going to do

1 about it? Are they drawing a lot of eyeballs? What
2 should we do about this?

3 In our view, we would produce that, for
4 sure. Now, someone doesn't need to say, oh, I looked at
5 this thing and I fear it's infringing. But there will
6 also be lots of just discussions about the fact that --
7 I'm guessing because I haven't looked at the documents,
8 I'm guessing the way that Mr. Zebrak also has been
9 guessing. But there will be documents in which people
10 say things like, we've had a lot of people listening to
11 music or people aren't listening to music.

12 And that's where we have a dispute. Their
13 view is that's relevant, despite the narrowed nature of
14 the case, it's within the realm of relevance because
15 there's going to be a -- you know, a piece that leads to
16 another piece to another piece of a story we're going to
17 tell about X, I guess, providing more lenient enforcement
18 (indiscernible).

19 THE COURT: Did you ask Mr. Zebrak that
20 question? Did you say, well, what if a documents says
21 there are lots of people listening to music or not
22 listening to music and what are we going to do about
23 that? Did you ask him, is that the kind of documentation
24 that falls within the scope of what the plaintiffs are
25 requesting?

1 MR. SHAPIRO: In meet and confers, maybe not
2 that exact example, but, yes. In the meet and confers we
3 said, well, you're just asking for us to talk about
4 whether people like music on the site, and we don't think
5 we should have to --

6 THE COURT: And I think you've acknowledged
7 that that's not inclusive in what they're requesting is
8 whether people like music or don't like music, that it's
9 something more than that. But I'll hear from Mr. Zebrak
10 again and have him confirm that.

11 I mean, this is the whole point of
12 requirement for you to try to resolve these disputes.
13 And I will tell you that the frustration from this side
14 of the bench -- and not specific to this case
15 necessarily, although there's some undertones of it
16 maybe. But the frustration on the judge's part is that
17 we get to a discovery, either a telephonic discovery
18 conference or an in-person discovery conference, and it
19 seems to be that there are two lawyers who are maybe
20 saying, well, we're not that far apart on something or,
21 you know, this is what we are saying we don't want to
22 have to produce, and then the other side stands up and
23 said, well, that was not what we were asking for anyway.

24 And I wonder -- I always wonder, why didn't
25 you have that -- why did I need to be involved in that

1 conversation? Why couldn't you have that conversation
2 and say -- you know, why couldn't you have just said to
3 Mr. Zebrak, well, are you looking for these kinds of
4 things of -- of a summary of here's what people are
5 listening to or not listening to and what do we need to
6 do to try to get more people to listen to X, Y and Z?

7 I mean, there may be something in there that
8 actually falls within relevancy in this case, but just to
9 use your example. I'm just trying to figure out how far
10 apart you really are on what should be produced and not
11 produced.

12 And I'm not going to go so far as to limit
13 it only to infringing music. And I understand that
14 you're saying that maybe there's a better description
15 because infringing has a very specific --

16 MR. SHAPIRO: It's legal.

17 THE COURT: -- legal connotation. And it is
18 not up to X Corp to determine whether something is an
19 infringement or not; although, there might be
20 circumstances in which in monitoring of its own site it
21 makes that determination, and that might be highly
22 relevant to this litigation. But I'm not going to -- I'm
23 not going to limit -- whatever I ultimately direct be
24 further produced in discovery, it's not going to be
25 limited to infringing music.

1 That's why I was trying to figure out if
2 there is some use of music description that you could
3 agree to. And I'm happy to have you-all have some more
4 conversations about that and, you know, let me know if
5 you reach an agreement about more of these discovery
6 requests that are in dispute because now you do -- are
7 both on the same page about what use of music means.

8 MR. SHAPIRO: Your Honor, we would -- so I
9 believe that we had floated unauthorized to the other
10 side in meet and confers and they did not accept that,
11 but I could be wrong and I -- we would absolutely modify
12 our proposed compromise to unauthorized.

13 Where the gap between us is, even if
14 we -- even if we're no longer talking about the literal
15 language of the RFP, which asks for all documents, if
16 we're asking about just the use of music generally on the
17 platform, our view is that under the federal rules, under
18 discovery, the discovery standards, that is still outside
19 what is appropriate in this case, just generic
20 presentations or surveys about use of music on X in a
21 case that has been narrowed to these three main points.
22 Again, not saying those three points are the only things
23 that are the topics of discovery, but in that case use of
24 music generally is not a proper topic for discovery.

25 THE COURT: Well, I understand that the

1 scope of liability has -- of potential liability has been
2 limited significantly, but that still remains that the
3 powers of monitoring and control over users and their
4 tweets and the economic incentives to tolerate
5 infringement, including because of things like
6 decision-making regarding licensing, those are all
7 arguably, at least, components of the monitor and control
8 and economic incentives of the outcome of what X Corp is
9 doing or not doing for purposes of the remaining count in
10 this litigation.

11 I mean, I -- that's -- it should be no -- as
12 you said, Mr. Shapiro, you're a good tea leaf reader and
13 it should be no surprise -- well, you didn't say that,
14 I'm saying that because obviously you are. And it should
15 be no surprise to you that that's at least where I'm
16 headed in this case is to find that these discovery
17 requests with some maybe slight modifications -- and
18 that -- are going to -- are likely going to be -- are
19 likely going to proceed.

20 That's why I wanted to see, though, if this
21 same information is already being requested in another
22 discovery request, either an interrogatory or request for
23 production, because if there's one thing I've learned
24 about lawyers in the years that I've practiced and since
25 I've taken the bench is if there's one way to request

1 something, lawyers are going to find five other ways to
2 request the same thing and demand that all five of those
3 have to be responded to, even though they ultimately
4 produce the same information.

5 So I want to see the other interrogatory
6 requests and requests for production. And that's why I
7 appreciate that you put together Exhibit B, because if
8 X Corp is already agreeing to produce information that is
9 broad enough, that it would include the information
10 requested in these remaining disputed discovery requests,
11 then there's really nothing left to argue about. You're
12 already -- you've already agreed to produce those. So
13 that's one possible resolution.

14 But if -- even if those -- even if the
15 agreed-upon discovery is not that broad, I still think
16 that there -- under Judge Trauger's decision and her
17 reference to there still being discoverable information
18 notwithstanding the dismissal of two counts -- and I
19 agree with you, there has to be a point for her order.
20 And the dismissal of those two counts of liability
21 doesn't mean that the plaintiffs can put you -- can put
22 X Corp to the same task that it would if there were -- if
23 their original claims of liability were proceeding.

24 But just as you said, there's, you know, two
25 ends of the spectrum of the shotgun approach and the

1 smoking gun approach. There's a whole lot of daylight
2 between those two. And I think these discovery requests
3 are likely going to fall somewhere in the middle, maybe
4 not exactly as requested.

5 What I frequently do is give the parties
6 some guidance about what I think is a more reasonable
7 discovery request and then leave it up to them to go back
8 and work out the specific parameters because, again, I
9 can rewrite discovery requests, but I've got plenty of
10 work to do that -- without doing the lawyers' work for
11 them.

12 So, go ahead.

13 MR. SHAPIRO: So as you were saying that, I
14 was thinking again about something you said right at the
15 beginning, which is that it's not necessarily typical for
16 a judge to include a sentence or two at the end of an
17 order on a motion to dismiss about discovery the way
18 Judge Trauger did. And what I believe Judge Trauger was
19 trying to do there was to preclude us from coming in and
20 saying -- so the contributory infringement claim,
21 Count Two, remains. And that's one where she correctly,
22 I think, applied the foster standard and said we had to
23 have been doing something that affirmatively encouraged
24 or fostered infringement.

25 And she didn't want us coming in and saying,

1 okay, because of that, you are not entitled to see, for
2 example, documents sufficient to show how we track
3 infringement notices or documents concerning the adequacy
4 of our copyright infringement policies because that
5 doesn't go to whether we're encouraging it.

6 All of these things that we've listed in
7 Exhibit B -- not all of them, but many of them. Because
8 you could imagine if we were being super-aggressive
9 lawyers and she hadn't included that sentence, many of
10 these items listed in Exhibit B, we would be saying
11 that's no longer in the case because you got rid of
12 vicarious liability. And anything that has to do with
13 economic incentive or monitor and control went out the
14 window with vicarious liability.

15 Well, it didn't, and so we were not able, in
16 response to a lot of these RFPs, to argue that they're no
17 longer in the case, and that's why we've agreed to these.
18 So that's how I think Judge Trauger's statement at the
19 end of her motion to dismiss order can be squared with
20 the positions that we're taking here.

21 I don't want to take up too much of your
22 time. I wanted to mention just -- respond to one or two
23 of the specific -- of course, to answer any questions you
24 have, but one or two of the RFPs that were discussed by
25 Mr. Zebrak because there's one on which I really hope

1 you're going to rule for us.

2 THE COURT: All right.

3 MR. SHAPIRO: I hope you're going to rule
4 for us on all of them. I don't want to be indicating
5 that some are less important, but this RFP 56,
6 Interrogatory 23 about the -- the trust and safety teams.
7 Here we're not even trying to limit it to infringement.
8 We're just saying we should not -- because this would be
9 burdensome. We should not have to go through and produce
10 materials about what our trust and safety team, how it
11 monitors because most of what the trust and safety team
12 does, I can represent this as an officer of the Court, is
13 not about copyright policies. It is about child porn,
14 hate speech, disinformation from foreign actors, fraud,
15 spam. It's huge, and there are all different kinds of
16 tools that are used.

17 And I heard Mr. Zebrak saying, well, maybe
18 there's a tool you use to filter out Russian election
19 interference and that might be interesting to us because
20 maybe we can argue that you should have used that in
21 copyright or maybe there's something you use about child
22 porn and, you know, we --

23 THE COURT: I'm not really sure that that
24 was his argument. I think his argument was that is there
25 something that you use with respect to, for instance,

1 copyrighted movies or other media, but not something that
2 is a completely different consideration like child
3 pornography or hate speech or antiterrorism, those kinds
4 of things.

5 Because you can be assured, Mr. Shapiro,
6 that if that is the scope of what Mr. Zebrak is looking
7 for, that's not going to be permitted. And if we need --
8 if that means that the -- the request for production
9 needs to be written -- rewritten or the interrogatory
10 needs to be rewritten to make it clear that it is, you
11 know, use of music only or we could say use of music and
12 other entertainment media, I mean, I think there are ways
13 to narrow that.

14 But I will agree with you that if what the
15 plaintiffs are requesting is that you have to produce all
16 the summary-level documents of your trust and safety team
17 without regard to what the subject is of their
18 monitoring, that's not going to be -- I am not going to
19 allow that scope of discovery. And I'll hear from
20 Mr. Zebrak about whether there's some way to rewrite this
21 request for production and this interrogatory to make
22 that clear, some further refinement besides some
23 summary-level documents. I agree with you, and I don't
24 think that was the scope, but if that was the intended
25 scope, then you already win on that issue because it is

1 not going to be that broad.

2 MR. SHAPIRO: All right. Unless Your Honor
3 has any other questions, I'll cede the podium.

4 THE COURT: Not unless you -- no, I don't.
5 Thank you very much.

6 MR. SHAPIRO: Okay. Thanks.

7 THE COURT: Mr. Zebrak, let me hear from you
8 with respect to that specific issue about the --
9 Mr. Shapiro has now introduced a new phrase, the trust
10 and safety team.

11 MR. ZEBRAK: Sure. Well, Your Honor, I'm
12 going to address that specifically. And I do want to
13 zoom out, though, a little bit at some point and reset
14 where we are, because we -- it's not that we appear far
15 apart. We are far apart.

16 And we've had -- I've been negotiating this
17 discovery with them, I've been on every single conferral
18 since the very first one in June. I've negotiated with a
19 handful of Mr. Shapiro's colleagues. He then got
20 involved after Judge Trauger had a conference with us in
21 June, it was apparent that neither he nor local counsel
22 were on any of the conferrals. I've since then
23 negotiated these with him.

24 He's rejecting positions that the defendant
25 knows are not our current position, Your Honor. I'm not

1 modifying these verbally here today for the first time.
2 We've done this in conferral after conferral. We've done
3 this in writing, including on submissions on this very
4 matter. And it's -- I think it does a disservice to the
5 distillation of these issues to have that kind of back
6 and forth. I'd like to address a couple of specifics.

7 THE COURT: Sure.

8 MR. ZEBRAK: As to that specific request,
9 Your Honor, I meant what I said when I stood up the first
10 time and said, of course there's a spectrum of relevance.
11 And I believe I said we're not looking for everything the
12 trust and safety department does, and that the most
13 relevant subject areas were the ones involved in what
14 else they're doing for monitoring and copyright.

15 I indicated for copyright outside the area
16 of music and I also mentioned trademark and counterfeit
17 issues. And I also mentioned -- and I even specifically
18 said we're not here talking about what they're doing to
19 monitor for hate speech. So instead Mr. Shapiro used the
20 example of election interference. Substitute in any one
21 of a half a dozen other sorts of issues, Your Honor.
22 That's not what we're here for.

23 I indicated it was the core subject areas
24 that I focused on. I also said another issue concerns if
25 they have tools that allow them to see if a user who they

1 suspended and said get off the platform is coming back.
2 You know, and I said that that's not limited to a given
3 category of speech. That's just a tool. And, you know,
4 so as to those, I think we've narrowed them. I've done
5 it verbally. If it'd help, we can redo the document
6 requests.

7 One of the things that the Court asked
8 about, Your Honor, is for the parties to file the
9 requests and the responses. And, of course, we're happy
10 to do that. I also have multiple copies here for
11 everyone if the Court wants paper copies.

12 But the issue is the discovery -- you know,
13 Mr. Shapiro's position is we ought not to comply with
14 these requests because we're doing -- we're acting
15 reasonably in response to other requests. And he
16 described this as an edge -- maybe not the word edge. He
17 said this isn't -- you know, that this isn't important to
18 our case.

19 These documents are very important to our
20 case. And I'll go through that in a moment, but on
21 the -- on the requests and the responses, the defendant
22 would have pointed out if it was already providing any of
23 the things we're arguing about in response to something
24 else.

25 So I appreciate that the Court is willing to

1 undertake that work, but I think the defendant's already
2 done that work by not pointing out -- in all the examples
3 Mr. Shapiro read aloud, Your Honor, those are not things
4 sought by today's request at issue. Those are all about
5 their specific responses and policies about what it does
6 as to copyright infringement and notices and repeat
7 infringers and policies. It's not the sorts of things
8 that we're talking about today. So, you know, he cited a
9 bunch of things that, yes, are very relevant, but it
10 really amounts to -- but I don't think there's anything
11 in these other requests. I just wanted to point that
12 out.

13 And as to the other areas we're talking
14 about, Your Honor, their position amounts to, because we
15 can't do everything, we'll give you nothing. And, you
16 know, we think we've shown relevance and we need
17 something. And we've indicated the something that we're
18 looking for, and that it's not sought by these other
19 requests.

20 You know, the defendant has indicated that
21 the case has been narrowed substantially. I'd like to
22 address that, Your Honor. The lines between direct
23 infringement and secondary infringement are -- can be
24 very difficult to ascertain.

25 THE COURT: I think Judge Trauger's already

1 made that clear, as has the Supreme Court already made
2 clear --

3 MR. ZEBRAK: Yes, Your Honor.

4 THE COURT: -- they're very, very blurred
5 lines.

6 MR. ZEBRAK: Yes, Your Honor.

7 THE COURT: Maybe blurred's not the right
8 word --

9 MR. ZEBRAK: Right.

10 THE COURT: -- they're not bright lines, at
11 least.

12 MR. ZEBRAK: Yes.

13 THE COURT: And that's part of the
14 difficulty in determinating -- in determining, in
15 determinations about the scope of discovery is that the
16 lack of bright lines with respect to the different kinds
17 of infringement means that there's going to be
18 information that's going to be broadly relevant, even
19 though there's been a narrowing of the ultimate liability
20 issues.

21 MR. ZEBRAK: Right. Yes, Your Honor. And
22 what I wanted to say on that front is that the lines are
23 murky at times not just between direct and secondary, but
24 also within the secondary, you know, as to which
25 doctrine, you know -- and sometimes conduct can violate

1 more than one or it best fits under one. And
2 Judge Trauger's approach in the motion to dismiss was to
3 go with the doctrine that the Court deemed to be the
4 clear best fit to the case.

5 But the defendant's approaching discovery as
6 if we now have a weak case or a narrow case. Your Honor,
7 this is the case that Judge Trauger thought best fit the
8 allegations, which, as we pled, the defendants are liable
9 for, you know, the specific infringers and infringements
10 that we brought to their attention. That's the touch
11 point for liability. But that doesn't mean that all this
12 other stuff about their economic incentives -- we're far
13 apart because what they want to do is limit everything to
14 just what they did in response to notices and what are
15 their copyright policies. They don't want to get to
16 their economic incentives and have come into the Court
17 what they know about what users are doing with music.

18 Some of it's going to be infringing use;
19 some of it won't be infringing. If it shows that it's
20 not infringing, well, that will be something they want to
21 cite to and, quite frankly, should want to get into the
22 case. They claim it helps them to the end that they
23 believe that not everything's infringing.

24 But much of it will be infringing. And it
25 will be infringing whether or not there are documents

1 that talk about use of music breakdown, ah, here it was a
2 commercial music video or here it was concert footage.
3 So it may break it down into those categories or it might
4 talk about it broadly, but we are far apart. This is not
5 an issue of a failure to communicate. This is an issue
6 of the defendant having a very aggressive position on
7 relevance. So --

8 THE COURT: What about this offer of
9 Mr. Shapiro to substitute the word unauthorized for
10 infringement? Does it have any -- is it a -- what is the
11 phrase, a difference without a distinction or a
12 distinction without a difference? Does it make any
13 difference?

14 MR. ZEBRAK: Your Honor, it doesn't.
15 It's -- you know -- you know, the defendant's being very
16 aggressive in what it wants to constrain the evidence in
17 the case to be. And, you know, our view is that if they
18 have documents that are talking about how users want to
19 upload music and they're promoting it, they're making
20 money from it, they're drawing engagement from it, it may
21 even break down the types of music that they're
22 uploading. Ah, people are uploading concert footage or
23 they're uploading synced videos where they take -- you
24 know, pick Your Honor's favorite's artist and pair that
25 song with some video that the person combines it with and

1 uploads it. Could talk about that sort of activity,
2 could be a whole range of it.

3 But the point is at some point if there's
4 trial where evidence gets put in, Judge Trauger's going
5 to deal with the Rules of Evidence and decide what comes
6 in. But right now they're trying to block it all out of
7 the case and say the only thing you get is if we
8 internally acknowledge that it's unauthorized or it's
9 infringing. Now, most defendants -- now, some of them do
10 and this defendant may have internal documents where they
11 acknowledge that users are engaging in a lot of
12 infringement. Those are certainly relevant. But suffice
13 it to say that many departments don't want to acknowledge
14 that a lot of the activity that they're making money from
15 and building their business on is infringing. So they're
16 not going to want to use words like infringing and
17 unauthorized.

18 So, again, if they're now arguing burden,
19 which they hadn't done all along, this was all about
20 relevance, they should be ordered to, in our view, make a
21 production -- and we can negotiate with them over the
22 scope, but it needs to be informed based on them having
23 some understanding of what exists, Your Honor. They
24 haven't looked into anything. They haven't said it's too
25 burdensome. They've just said it's wholly irrelevant.

1 You know, we're seven months into discovery.
2 We served these requests in May. Substantial completion
3 of document production's due in mid March, Your Honor.
4 The parties are now actively negotiating over search
5 terms and email custodians. We're now arguing on
6 something that Judge Trauger already indicated is
7 relevant. And we're not looking to push the boundaries
8 on burden, but they're taking positions that I think
9 Your Honor's already recognized, you know, actually are
10 relevant. And, you know, the idea of us negotiating with
11 them for months on stuff that we should have had long ago
12 within what they've agreed to do, you know, we will, of
13 course, do that, Your Honor, but we'd like to resolve
14 these and move on as soon as we can.

15 THE COURT: All right.

16 MR. ZEBRAK: Thank you.

17 THE COURT: Thank you, Mr. Zebrak.

18 Anything else, Mr. Shapiro?

19 MR. SHAPIRO: Just briefly, Your Honor.

20 You might not be surprised to hear that I
21 respectfully disagree with Mr. Zebrak's characterization
22 of what has happened in these meet and confers. I've
23 been on some and I've gotten reports on every one of
24 them, and we've come out of them, and I believe my
25 representations were entirely accurate, No. 1.

1 No. 2, the -- on the content monitoring,
2 Mr. Zebrak's up here saying, well, this is all, you know,
3 silly of Mr. Shapiro to say. It's in the RFP itself.
4 We've never received a narrowing, other than, well, what
5 we're primarily interested in. And we've come back with
6 a proposed compromise.

7 No. 3, on these RFPs involving monetization
8 or the -- excuse me, the example Mr. Zebrak gave about
9 monetization, RFP No. 48, we discussed this on page 18,
10 18 out of 31 in the joint statement. I think -- yes, I
11 guess they have -- it is on the docket page numbers, that
12 is.

13 RFP No. 48, they've asked for documents
14 sufficient to show or describe technical process by which
15 ads are promoted, content are placed on the platform,
16 et cetera. We say we are willing to produce documents
17 sufficient to describe aspects of any algorithm or
18 technical process for advertising that promotes or
19 monetizes infringing content over noninfringing content.

20 I believe that's one of the ones we
21 compromised on. They've accepted that. I think that
22 suggests that a similar approach in some of these other
23 RFPs and rogs should also be acceptable.

24 Finally, Mr. Zebrak made reference to
25 problems -- their desire to learn about whether suspended

1 users can come back onto the service. That's one of the
2 items that's already listed in Exhibit B. And as
3 Your Honor said when I was up here a little bit earlier,
4 some of these are items that have already been asked for
5 in one way and they're being asked for in a somewhat
6 different way. That's neither appropriate nor necessary.
7 This item of suspended users and how they come back onto
8 the site is already covered.

9 THE COURT: Which one is that on Exhibit B?

10 MR. SHAPIRO: That is 22, documents
11 sufficient to reflect the reactivation of services for
12 any platform user whose account was permanently suspended
13 or terminated pursuant to X's DMCA policy. X will also
14 produce documents reflecting policies and practices
15 regarding any access that suspended users have to their
16 accounts.

17 So for all of these reasons, Your Honor, I
18 think that while we may have a disagreement about whether
19 the case as framed in Judge Trauger's motion to dismiss
20 order is a substantial narrowing of the case or -- as we
21 believe, or inconsequential, as Mr. Zebrak was trying to
22 suggest, it certainly has to be of some import. And I
23 hope Your Honor will side with us on as many of these
24 disputes as you see fit.

25 THE COURT: All right. Go ahead. Thank

1 you, Mr. Shapiro.

2 Go ahead, Mr. Zebrak.

3 MR. ZEBRAK: Your Honor, first of all, I
4 didn't refer to Judge Trauger's ruling as
5 inconsequential. What you just heard is case in point
6 for why we think we need a ruling on this, Judge.
7 Mr. Shapiro just referenced two pieces of discovery. So
8 he said on Exhibit B, RFP 22 addresses the same thing
9 that we were asking about under RFP 56 under the -- you
10 know, under the tools and practices content moderation
11 that we were talking about. That's obfuscation. One is
12 not the same as the other.

13 RFP 22 that he has on this Exhibit B has to
14 do with the defendant reactivating a service for
15 somebody, meaning someone from the defendant's
16 organization suspending them and then turning them back
17 on or the person turning itself back on, maybe if there's
18 a click-out or something. That's RFP 22.

19 That's different than the thing we were
20 talking about in the first category about monitoring and
21 control, where we were asking about tools the defendant
22 may use to relate one account to a new account. For
23 example, if it says I don't want this Zebrak guy on my
24 site anymore and they have some flag or monitoring thing
25 to see if Zebrak signs back up again, those are the kinds

1 of things we were talking about.

2 The point I made before, I stand by, which
3 is if the defendant in any way reasonably thought that
4 anything that they've promised to do in this exhibit
5 forestalled what we were moving on today, they would have
6 raised it, and they haven't. And 22 is not something
7 that addresses 56.

8 And secondly, I thought I heard Mr. Shapiro
9 say that plaintiffs have agreed to accept -- so,
10 Your Honor, what Mr. Shapiro tried to do is indicate that
11 our refraining from moving on RFP 48, which is something
12 we resolved in an effort to narrow the issues for today,
13 somehow means that we're willing to accept their
14 modifying all the requests that we've just argued about
15 with the word infringing. That is absolutely not the
16 case, Your Honor.

17 We -- we agreed to remove four requests from
18 today's hearing, Your Honor, that you saw through the ECF
19 notice, but it's not because we deemed this modification
20 of the request with the word infringing as an acceptable
21 way to narrow the discovery that's otherwise relevant.
22 We did it recognizing that we wanted to narrow the issues
23 for today and that, with respect to RFPs 47 and 48, we
24 could use the combination of what's in the public domain
25 about their system, which they themselves specifically

1 directed us to when they encouraged us to think further
2 about this, with them agreeing to identify people in
3 response to Interrogatories 22 and 24.

4 But the fact that we negotiated a compromise
5 on four discovery requests shouldn't be used to be held
6 against us on all this other stuff that we think is just
7 patently relevant. And we think it's obvious that it's
8 relevant and we think Judge Trauger reinforced that and
9 that the defendants just need to be ordered to do
10 something here.

11 THE COURT: All right. Thank you.

12 MR. ZEBRAK: Thank you.

13 THE COURT: Thank you, Mr. Zebrak. All
14 right. The Court's going to take this under
15 advisement...

16 All right. I'm going to take this under
17 advertisement and either issue one order, it may be a
18 series of orders. For instance, if I give you some
19 guidance about what I would find discoverable, I may, as
20 I said earlier, direct you-all to submit proposed revised
21 discovery requests and I'll pick from one of the two,
22 which is one way that I've resolved some discovery
23 requests -- discovery disputes before.

24 I do want to see the original discovery
25 responses. Are those responses -- do the responses first

1 set out the request and then have the response so it's
2 all in one document?

3 MR. ZEBRAK: Yes, Your Honor. They do.

4 THE COURT: All right. And I don't need to
5 see all the attachments. I just need to see the
6 one document that has the request and then the
7 defendant's response. But I don't need to see any
8 produced documents, for instance.

9 MR. ZEBRAK: Right.

10 THE COURT: So if you have a hard copy of
11 that, you can give it to Ms. Fishman. I still want you
12 to file it because I may refer to it, but if you have an
13 extra copy, then it saves Ms. Fishman having to print it
14 out and --

15 MR. ZEBRAK: Sure, I can -- yes, Your Honor.

16 THE COURT: All right. If you can give that
17 to Ms. Fishman before we leave today. And then go ahead
18 and file it subsequent to today's proceeding, just do a
19 notice of filing as instructed today to file the original
20 discovery requests and responses all in one document, if
21 it's all in one document. If it's in two documents, file
22 it in two documents. But you understand what I'm asking,
23 Mr. Zebrak?

24 MR. ZEBRAK: Yes, Your Honor. And, of
25 course, that's fine. We'll do that as Mr. Shapiro

1 indicated we would. My only question is that, of course,
2 for each of these there's then further narrowing that
3 occurs back and forth by email and various writings,
4 which I assume the Court doesn't want all that. We tried
5 to create an abridged version of that in the exhibit that
6 we prepared, which is very small.

7 THE COURT: Maybe what I need you to do,
8 then, is to tell me which ones you've --

9 MR. ZEBRAK: Yeah.

10 THE COURT: -- agreed to, at least.

11 MR. ZEBRAK: Well, it's not -- I mean, if we
12 agreed -- it's more by way of the fact that, you know, of
13 course, as the plaintiff, we don't know --

14 THE COURT: Right.

15 MR. ZEBRAK: -- the proper nomenclature or
16 the volume of what they have, so it's a request, they
17 have their form responses, we then negotiate. Sometimes
18 we'll then say here's what we're really looking for. I
19 think the Court may want the benefit of that. We tried
20 to create an abridged version of that in the chart that
21 we attached with the joint statement.

22 THE COURT: Well, and I'm not going to --
23 just to be clear to everyone, I'm not going to do -- I
24 don't know if it was you who described it or Mr. Shapiro,
25 but I'm not going to go through every discovery response

1 to compare to these and see if there's something that
2 these might fall under. It was more a high flyover.

3 MR. ZEBRAK: Okay.

4 THE COURT: So why don't you go ahead and
5 give that to Ms. Fishman and file it. And if there's
6 something else that we think we need to see to be more
7 informed, to be fully informed, then I'll do an order
8 directing an additional filing. That may be -- at least
9 be helpful or it may not be helpful at all.

10 MR. ZEBRAK: Understood. Sure.

11 THE COURT: Provide that to Ms. Fishman and
12 then file that as a notice of filing subsequent to -- as
13 requested at today's proceeding.

14 MR. ZEBRAK: We'll do that, Your Honor. And
15 what we'll also do is -- obviously the defendant and
16 plaintiffs still have different views about where this
17 all should land, but we'll, of course, continue to
18 discuss. And if there's a way we can resolve something,
19 go ahead and submit some proposed agreement, we'll do
20 that.

21 THE COURT: Sure. You-all know, at least
22 have a general idea of where I'm likely to wind up. So
23 you should continue to have discussions about whether
24 there's any possible resolution of -- and, you know, if
25 it helps to completely -- maybe not -- maybe rewrite's

1 not the correct word, but if it helps to completely
2 wordsmith an existing request to conform to the course of
3 conversations so that everyone's on the same page about
4 what the most current --

5 MR. ZEBRAK: Yes.

6 THE COURT: -- issue is, the most current
7 request is, then you should go ahead and do that because
8 sometimes it's just -- it just takes that. It just takes
9 seeing something --

10 MR. ZEBRAK: Got it.

11 THE COURT: -- for the parties to be able to
12 agree that, okay, that -- now we've gotten to the point
13 where that does finally resolve all the issues.

14 So I would encourage you to continue to do
15 that. We will get to this discovery request as soon as
16 possible, but I cannot commit to you a particular time.
17 I understand that discovery's ongoing, that you're coming
18 to the end of the discovery period, that this dispute's
19 been pending for a while, but it's new to me and it's
20 being worked into all of the other matters that I have
21 pending as well and some of which have been pending as
22 long or longer than this. So we'll get it attended to
23 just as quickly as possible --

24 MR. ZEBRAK: Sure.

25 THE COURT: -- but without any promises

1 about when that might be.

2 MR. ZEBRAK: Fully understood, Your Honor.
3 And thank you again.

4 THE COURT: All right. Thank you,
5 Mr. Zebrak. Thank you, Mr. Shapiro and all co-counsel.
6 I appreciate it. Your preparation, especially the
7 exhibits for today, is very helpful. And, again, we'll
8 take this matter under advisement and get one or more
9 orders out just as soon as reasonably possible. We'll be
10 in recess.

11 *****END OF ELECTRONIC RECORDING*****

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That I transcribed from **electronic recording**
the proceedings held on January 6, 2025, in the matter of
CONCORD MUSIC GROUP, INC v. X CORP, Case No.
3:23-cv-0606;

This is the 15th day of January, 2025.

s/ Roxann Harkins_____
ROXANN HARKINS, RPR, CRR
Official Court Reporter